Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLE

NO. 78-513

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1978

RICHARD T. TRACY, SR., PETITIONER

v.

WILLIAM P. DIXON, ET AL., RESPONDENTS

ON PETITION FOR A WRIT
OF CERTIORARI TO THE
ARIZONA SUPREME COURT

BRIEF FOR RESPONDENTS IN OPPOSITION

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ARGUMENT

The Petition for Writ of Certiorari was not filed within ninety days after denial of Motion for Rehearing. There was no extension of time granted by a Justice of the Supreme Court. The command of 28 U.S.C. 2101(C) is that a writ of certiorari must be sought "within ninety days after entry of such judgment or decree."

Where, as in this case, the time for filing a petition is established by an Act of Congress rather than a rule of this Court, an untimely filing has consistently

been held to be jurisdictional defect, making it impossible for the Court to waive the untimeliness or to entertain the petition. Such a Petition "must be denied for want of jurisdiction." Department of Banking v. Pink, 317 U.S. 364, 268 (1942). A waiver of untimeliness can be made only where a rule of this Court, rather than a statute, establishes the time requirement. Sclacht v. United States, 398 U.S. 58, 63-65 (1970).

The Petitioner has raised the same issues presented here in an action filed in the United States District Court for the District of Arizona, CIV 77-121, which is presently on appeal to the United States Court of Appeals for the Ninth Circuit, No. 77-2034.

CONCLUSION

The Petition for Writ of Certiorari to Arizona Supreme Court should be denied.

Respectfully submitted,

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